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## AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. 71-507

WILFRED KEYES, et al.,

*Petitioners,*

v.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, et al.,

*Respondents.*

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

# BRIEF OF JEWISH RIGHTS COUNCIL, INC. AS AMICUS CURIAE

## Interest of the Amicus

The Jewish Rights Council, Amicus, was founded in 1971 for the purpose of ensuring and promoting equality of all persons before the law, and in that manner to strengthen and

preserve the security and constitutional rights of Jews in America through the preservation of the rights of all Americans. The Jewish Rights Council believes that the welfare of Jews in the United States is inseparably related to and dependent upon the equality of treatment of all Americans. The Jewish Rights Council's membership includes over one hundred Rabbis from over a dozen States, representing Orthodox, Conservative, and Reform Congregations.

The instant case raises an important, if not crucial, issue under the Equal Protection Clause of the Fourteenth Amendment, involving the imposition by a Federal Court upon an elected School Board of ethnic quotas of pupils in public schools. Public education has been one of the keystones for the unprecedented success of the Jew and other minorities in this country, and therefore the Jewish Rights Council has a particular interest in quality as well as equality in public educational facilities. Being composed of members of a persecuted minority, the membership of the Jewish Rights Council is especially sensitive to any and all forms of discriminations based upon race, religion, or ethnic background. On the other hand, the Jewish Rights Council believes that it is extremely important for the preservation of our American way of life with its concomitant "American dream" that the rights of one group of persons shall not be sacrificed in the name of the promotion of another minority group. In so doing, the Jewish Rights Council wishes to make it crystal clear that there must never be any retreat from the principle of *Brown v. Board of Education*, 347 U.S. 483 (1954), that a State should not be able to keep a person out of a public school (or other facility) merely on the basis of race, religion, or ethnic background.

## Consent to Filing

This Brief is being filed with the consent of all parties to the proceeding.

## Opinions Below

The opinions of the District Court are reported at 303 F. Supp. 279; 313 F. Supp. 61; and 313 F. Supp. 90. The opinion of the Court of Appeals is reported at 445 F.2d 990.

## Statement of the Case

This case arose when a newly elected school board rescinded Resolutions 1520, 1524 and 1531 of the previous school board in Denver, Colorado; and the newly elected school board instituted Resolution 1533 instead. The rescinded Resolutions 1520, 1524 and 1531 sought to achieve a system of ethnic quotas in the pupil compositions of various schools by means of redistricting their respective boundaries; whereas the newly instituted Resolution 1533 provided for a voluntary pupil exchange program between various districts.

The plaintiffs below brought a Civil Rights action against the school board in two causes of action which are pertinent here:

Cause I: The rescission of Resolutions 1520, 1524, and 1531 constituted a violation of the Constitution.

Cause II: *Count 1*: Both old and new defendant school boards were guilty of deliberate segregation in a "core" area of the City of Denver.

*Count 2:* The defendants had purposely maintained inferior schools in certain designated predominantly minority schools.

*Count 3:* The defendants' neighborhood school policy was a violation of the Constitution.

The District Court held for the plaintiffs on Cause I and on Cause II, Count 2 only. The Court of Appeals affirmed the judgment of the District Court, except for Cause II, Count 2 on which the Court of Appeals reversed the judgment of the District Court.

## ARGUMENT

### POINT I

**A Federal Court Has No Power to Require a School Board to Adopt a Plan to Achieve Ethnic Quotas of Pupils in Neighborhood Schools.**

The stigma of racial segregation, caused by a school board's refusal to allow a single person of a given ethnic or racial background to attend a public school, is intolerable in America under the Fourteenth Amendment. *Brown v. Board of Education*, 347 U.S. 483 (1954). Such segregation prevents, for example, a Black person from ever attending a certain school no matter what ability the Black person may possess, no matter where he lives, no matter how hard he tries. It is simply intolerable in a society such as ours under the Fourteenth Amendment. An entirely different question is presented where a school board merely continues a long-standing and traditional neutral policy of neighborhood schools in the name of public safety, health, welfare and morals; for these objectives of a

society under ordered liberty are the primary responsibility of the States of which the school board is an agent. The State has plenary "police power" with regard to these functions; and there is no Federal jurisdiction which can properly operate in this area, so long as the State and its agents remain neutral with regard to race, religion, and ethnic origin.

There are many legitimate "police" functions served by the neighborhood school. With the increasing problem of groups of students "all over the land [who] are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins" (Black, J. dissenting in *Tinker v. Des Moines Community School District*, 393 U.S. 503 at 525; 1969), a Federal Court should be especially careful not to undermine the primary authority of the school board. Moreover, the neighborhood school ensures that pupils and teachers know each other better, so that outside untoward influences, such as drug-peddlers, are easier to detect, isolate, and eradicate. Thus, the role of the Federal judiciary should be most sensitive to the needs of the legitimate local "police" functions and responsibilities of school boards; and therefore the courts should limit the scope of appropriate judicial function and interference in the workings of the school boards accordingly, lest the judiciary unintentionally undermine the whole system of public education. Clearly the Federal Courts are ill-equipped to cope with the day to day exigencies faced by school boards.

In view of the foregoing, it seems imperative that a great deal more than a mere preponderance of the "sharp conflict" of evidence (445 F.2d 990, 1001) should be required before a Federal Court intervene in the internal affairs of a school board. See: *Milky Way v. Leary*, 305 F. Supp. 288, 292 (S.D.N.Y., 1969), aff'd 397 U.S. 98 (1970).

It should be stressed repeatedly that this case emphatically is not a case of segregation, but rather is a case involving a finding of de facto racial "imbalance" brought about by housing patterns resulting from private choices. The judicial finding below of a racial or ethnic "imbalance" necessarily implies a finding of a departure from some arbitrarily conjectured ethnic quota. Yet this Court itself has warned of the tremendous difficulties and chaos which would result from the imposition of such quotas in "a population made up of so many diverse groups as ours". *Hughes v. Superior Court of California*, 339 U.S. 460, 464 (1950). And racial quotas themselves may exacerbate "community tensions and conflicts" particularly among the non-quota minorities "through the whole gamut of racial and religious concentrations". *Ibid.*

The instant case does not at all raise a "segregation" issue as in *Brown v. Board of Education, supra*, but merely poses the question of the appropriateness of a Federal remedy of ethnic quotas to change ethnic pupil ratios brought about by private housing patterns in a neighborhood school system.

The interference of the District Court below in the affairs of the school board would not be so serious were it not for the fact that the forgotten child in all of this is the poor black, Hispanic, etc. or white pupil in the predominantly white school who is "being conscripted only on the basis of income" and who may not "escape", as may his more affluent neighbor, either to the suburbs or to a private school. Nathan Glazer, "Is Busing Necessary?" *Commentary*, Vol. 53 Number 3, March 1972, p. 39 at 45-46 (published by the American Jewish Committee, one of the Amici jointly with the Anti-Defamation League in this case). Especially is this state of affairs compounded by the fact

that the District Court put heavy reliance upon the relatively low Achievement Test results of students in "designated schools" (445 F.2d 990 at 1003). Just the other day, a California District Court held that IQ tests were unconstitutionally used by a school district because they resulted in a disproportionately large number of Black children being sent to mentally retarded classes. *Larry P. v. Riles*, 41 LW 2033 (D.N. Cal. June 21, 1972). Can constitutional rights depend upon the latest fashions in educational testing?

Many years ago, just after the *Brown, supra,* decision, the late Professor Edmond Cahn cautioned against using "expert" sociological testimony for any purpose other than to *support* legislative action or merely to reinforce common knowledge:

"It is one thing to use the current scientific findings, however ephemeral they may be, in order to ascertain whether the legislature has acted reasonably in adopting some scheme of social or economic regulation; deference here is shown not so much to the findings as to the legislature. It would be quite another thing to have our fundamental rights rise, fall, or change along with the latest fashions of psychological literature. Today the social psychologists – at least the leaders of the discipline – are liberal and egalitarian in basic approach. Suppose, a generation hence, some of their successors were to revert to the ethnic mysticism of the very recent past; ... What then would be the state of our constitutional rights?" "Jurisprudence", *1954 Annual Survey of American Law*, 809 at 826.

Implicit in the notion of racial quotas, to change racial mixes brought about by private housing patterns, is the idea that a certain mix of races in certain proportions is constitutionally required in order to enable the members of certain

minority groups to learn better in public schools. However, the interpretation of the statistics used to validate this notion fails to consider that there are reasons unrelated to ethnic balance which account for the fact that a significant proportion of Black students who attend predominantly White neighborhood schools seem to learn better. For these Black students tend to come from middle-class Black homes, and it may well be the home environment which accounts for their learning better in their neighborhood school. It is a well-established fact that "socioeconomic factors bear a strong relation to academic achievement" and that "schools as they have been generally run in this country do not make much difference in the educational achievement of students, that what is more important is the home and community environment of children." *Equality of Educational Opportunity* ("Coleman Report"), 1966, U.S. Office of Education, OE 38000, at p. 21; N.Y. Times, March 24, 1972, p. 54, col. 1. Thus, purely on a socioeconomic basis, i.e. the type of homes that Black students in neighborhood White schools come from, it would be expected that Black students in White neighborhood schools should achieve better results than the poor Black students in Black neighborhood schools, for reasons which are independent of the racial composition of the student body in the respective schools but which are dependent upon the type of homes the Black students come from. Thus, it is neither invidious discrimination nor the racial ratios in neighborhood schools which necessarily accounts for the differences in achievement levels of Black students in Black vs. White neighborhood schools. Moreover, the expectations of experts regarding the educational benefits of ethnic quotas in public schools have not been realized in practice. N.Y. Times, *ibid.*

Thus, this case thrusts upon us the spectre of legally

mandated social experimentation. Surely the Constitution does not require the State to perform such experiments. Particularly is this experimentation, under the coercion of a Federal Court order, totally unnecessary in a case where, as here, the school board has instituted a voluntary transfer program, which can more easily be policed by the school authorities, so that each parent may decide for himself whether he wishes his own child to take part in the experiment for the sake of a hoped-for better education. There simply is no room in a case like this for any coercion by the Court below in its judicial legislation of school boundaries to achieve what it believes to be a proper system of "ethnic group quotas". Glazer, *supra*, *53 Commentary* at 52. For the promise of *Brown*, *supra*, already "is being realized" without such ethnic quotas. *Ibid.*

Ethnic quotas on Grand Juries have long ago been condemned as unconstitutional by this Court. *Cassel v. Texas*, 339 U.S. 282 (1950). Likewise, this Court has held the States to be free to ban the picketing of a business establishment for the purpose of pressuring the hiring of employees on a racial quota basis. *Hughes v. Superior Court of California*, 339 U.S. 460 (1950). Pupil assignments on a racial basis in public schools likewise should be avoided by school boards, and certainly not coerced by the federal judiciary.

While the judiciary has the duty and power to implement the negative command of the Equal Protection clause of section 1 of the Fourteenth Amendment, only the Congress is given the authority to implement the affirmative power of section 5 of the Fourteenth Amendment. If such a departure from traditional practice, as racial pupil quotas, is to become a part of our national scheme, then at the very least it should be the Congress which decree such a policy after appropriate hearings in depth.

Yet the Congress has explicitly legislated *against* such a policy in enacting the Civil Rights Act, 42 USC 2000e – 6 (a)(2). Thus, Congress has re-affirmed a policy against racial or ethnic quotas as set forth by this Court in *Hughes, supra*. There is simply no reason in law or policy why this Court should not now likewise continue our national commitment of equality for all, with quotas for none.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed, except insofar as the Court of Appeals affirmed the judgment of the District Court on the First Cause of Action and in this respect the judgment of the Court of Appeals should be reversed; and the cause should be remanded to the District Court with directions to dismiss the complaint.

Respectfully submitted,

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